No.80-1892

MAY 28 1981

ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1980

AARON CLINTON ATKINS, PETITIONER,

VS.

STATE OF MICHIGAN
(WILLIAM L. CAHALAN,
WAYNE COUNTY PROSECUTING ATTORNEY
AND
WILLIAM LUCAS, WAYNE COUNTY SHERIFF),
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

THE DECISION BY THE SIXTH CIRCUIT COURT OF APPEALS, HOLDING THAT THE REMEDY FOR A CLAIM OF DENIAL OF THE RIGHT TO A SPEEDY TRIAL MADE IN A PETITION FOR A WRIT OF HABEAS CORPUS FILED PRIOR TO TRIAL AND PRIOR TO CONVICTION IN THE STATE CRIMINAL CASE WAS TO ORDER THE STATE TO PROCEED TO TRIAL, NOT TO DISMISS THE STATE CRIMINAL CASE, WAS A CORRECT APPLICATION OF THE DECISIONS OF THIS COURT.

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Now comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan and William Lucas, Wayne County Sheriff, by Edward Reilly Wilson, III, Principal Attorney, Appeals, and Anne B. Wetherholt, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit issued on March 2, 1981 be denied.

OPINIONS BELOW

On April 15, 1980 the United States District Court for the Eastern District of Michigan, Judge Anna Diggs Taylor issued an opinion granting petitioner Aaron Clinton Atkins' pretrial-preconviction petition for a writ of habeas corpus, ordering him discharged from Wayne County Jail where he had been remanded to await trial on a charge of first degree murder, and dismissing the pending state murder case against him.

On March 2, 1981 the United States Court of Appeals for the Sixth Circuit issued an opinion which reversed the judgment of the federal district court, reinstated the state criminal charge of murder and ordered that the state trial commence within sixty days.

STATEMENT OF JURISDICTION

On March 2, 1981 the United States Court of Appeals for the Sixth Circuit issued an opinion which reversed the April 15, 1980 judgment of the United States District Court for the Eastern District of Michigan, reinstated the state criminal charge of murder and ordered that the state trial commence within sixty days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and

> to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory processes for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This state criminal case had a lengthy procedural history in the state courts of Michigan. Respondent apologizes for the length of his statement of facts but believes a full recitation of facts is necessary to a full understanding of the issues presented by petitioner.

A. REMAND/BOND DECISIONS IN TRIAL COURT

Aaron Clinton Atkins was arrested and arraigned on January 22, 1979 on the charge of first-degree premeditated murder, MCL 750.316.

At the arraignment on the warrant on January 22, 1979, the arraigning magistrate remanded defendant on the murder first degree charge without bond, consistent with the Michigan Constitution of 1963, Art I, § 15, MCL 765.5 and Michigan Court Rule GCR 1963, 790. The next scheduled proceeding was preliminary examination.

The next day, on January 23, 1979, the defense counsel approached the Honorable Samuel C. Gardner, Chief Judge of Recorder's Court, with a motion to review the bond set by the arraigning magistrate. Judge Gardner orally designated Judge Dalton Roberson to hear this motion because Attorney Edward Bell was in the courtroom on another case and convenience dictated that judge hear the case. The motion was filed without notice to the prosecution. See MCL 765.3. The prosecutor handling the case discovered the case was being sent to Judge Roberson and managed to send another prosecutor to appear for him.

Judge Roberson had a report from the R.O.R. (Release on Recognizance) division of the court which recommended no change in status. The judge was informed of the defendant's prior record of violent felonies and the nature of this offense. However, Judge Roberson set bond at $50,000/2 sureties. He did not explain his exercise of jurisdiction in the cause, nor did he find that the arraigning magistrate abused his discretion, contrary to 790.7(d). (Transcript of 1-23-79).

No appeal was taken from that decision, because the People believed the examining magistrate, after hearing the proofs, could consider the question of bond.

A participant in the crime, Ronald Moore (Moon) was the main witness in the preliminary examination held January 31, 1979. Ronald Moore (Moon) testified that he had participated in the murder of Girard Tolbert. Atkins called the Goldfarb Bonding Agency to arrange for Tolbert's release (Preliminary Examination Transcript page 67-72) (hereinafter P.E.). Atkins mentioned to Moore that "Melvin had messed up shooting at somebody and messed up a hit or something of that nature" the "previous night" (P.E. 70). Moore and Atkins took Tolbert to a house on Monica, which was Melvin Wiggins' girlfriend's house (P.E. 73). When Moore went with Atkins to get some narcotics, Atkins told him, "the guy had to

be taken out," meaning "killed." (P.E. 74) because "he made some statements or something." (P.E. 75). Upon returning with a quarter of an ounce of raw heroin, Moore, Atkins and Wiggins took Tolbert to the basement (P.E. 80-81), subdued him, and injected heroin into him two times (P.E. 81-84). After the second injection, Tolbert just laid there. Nevertheless, Atkins told Wiggins to fill up the laundry tub and Moore, Atkins and Wiggins held Tolbert's head in the water for eight minutes (P.E. 84-85). Atkins told Moore and Wiggins to dispose of the body and they did (P.E. 85, 89). After hearing this testimony the examining magistrate, Judge Clarice Jobes, bound defendant over for trial on the charge of first degree murder and based on the proofs, ordered him remanded to jail, as authorized by the Michigan Constitution of 1963, Art 1, § 15, MCL 765.5 and GCR 1963, 790.1.

On February 6, 1979, Judge Evelyn Cooper, assigned as the trial judge, heard defendant's motion to reinstate the bond set by Judge Roberson, which alleged "there is no over-riding reason why the examining magistrate should over-rule Judge Roberson's previous decision." Judge Cooper instead ruled in a written order that 1) Judge Jobes lacked jurisdiction to disturb the bond set by Judge Roberson who was sitting as a Recorder's Court Judge and 2) that GCR 1963, 790.7(a) and (b) precluded her from disturbing the bond Judge Roberson set.

On the same day, February 6, 1979, the People filed an application for emergency leave to appeal Judge Cooper's decision to the Michigan Court of Appeals, along with a motion for immediate consideration and an emergency motion for a stay of proceedings. The court's written order was attached to the pleadings and filed in the Court of Appeals. The prosecution believed Judge Cooper was clearly erroneous in her interpretation of Michigan law: Judge Jobes, the examining magistrate, did have jurisdiction to consider anew the issue of bond

based on her assessment of the proofs. The prosecution also believed that Judge Cooper had the power to review the bond decision of Judge Jobes under GCR 1963, 790 and that the prosecution had the right under *People* v *Edmonds*, 81 Mich App 743 (1978) to introduce additional evidence to confirm that the remand was not an abuse of discretion. Judge Cooper's ruling that she had no jurisdiction precluded such proofs. In its emergency application for leave to appeal the prosecution included evidence it would have presented on the issue of bond. These proofs included the fact that a) defendant Atkins had a prior history of flight to avoid prosecution — he was previously charged with murder and fled to California where he was apprehended on February 3, 1975, b) he had three violent felony convictions in the past fifteen years and has the reputation of being a major level narcotics dealer in Detroit, GCR 1963, 790.5(5), c) the murder charge in the instant case involves the silencing of a potential witness against him, and d) the existence of a threat to the life of the principal prosecution witness, Ronald Moore, based on information that a $100,000 contract was let on his life. The prosecution requested the Court of Appeals to either remand the matter to Judge Cooper to examine the proof offered by the prosecution to determine if the examining magistrate abused her discretion or for the appellate court to examine the proof, review the magistrate's decision pursuant to GCR 1963, 790.7(b) and if there was no abuse of discretion, to remand defendant to the custody of the sheriff. Defense counsel submitted to a responsive brief in the Michigan Court of Appeals.

B. APPELLATE REVIEW AND ORDER OF REMAND

The Michigan Court of Appeals heard this matter on an emergency basis, GCR 1963, 806.5, and after due consideration of the trial court's written order and briefs by both par-

ties, the Court of Appeals in a peremptory order, authorized by GCR 1963, 806.5, 806.7 and 820, on February 9, 1979, Docket No. 43550, granted the People's motions and ruled:

> IT IS FURTHER ORDERED that the bond set by the trial court in this cause be, and the same is hereby CANCELLED and the defendant is hereby ordered remanded to the Wayne County Jail.

Defendant's application for leave to appeal this ruling to the Michigan Supreme Court was denied in Docket No. 62845.

C. PRETRIAL AND EVIDENTIARY TRIAL MOTIONS IN THE TRIAL COURT

Trial for defendant Atkins and co-defendant Wiggins was scheduled for April 5, 1979. On March 21, 1979 the trial court heard pretrial motions by both the prosecution and the defendants. Both motions were taken under advisement; the prosecution's motion to endorse witnesses was granted on March 29, 1979. A defense motion to suppress Mr. Atkins' criminal record was granted on March 29, 1979. At the same time the trial court refused to suppress the criminal record of a prosecution witness. This ruling was also the subject of an emergency application for leave to appeal taken on April 2, 1979. On April 4, 1979 the Michigan Court of Appeals ruled against Judge Cooper on the matter, Docket No. 44454. Upon defendant's application to the Michigan Supreme Court for leave to appeal that order, the Supreme Court modified the order to conform with Michigan Rule of Evidence (MRE) 609, Docket No. 63042.

Also on March 21, 1979 co-defendant Wiggins had made a motion for an evidentiary hearing. At the hearing both defense counsel participated, arguing entrapment and that

the search warrant was invalid and the resulting evidence should be suppressed. This motion was also taken under advisement on March 21st (Transcript of 3-21-79). On April 5, 1979, the day set for trial the motion had not yet been ruled on. When the prosecution presented a brief to defense counsel on its motion to admit testimony at trial on a matter which the prosecution was under no duty to give notice under *People* v *Hicks*, 70 Mich App 430 (1976), the trial court adjourned the trial without ruling on either this motion or defendant's pending motion. (Transcript of 4-5-79)

On May 14, 1979 the trial court ruled on defendant's search warrant motion by finding the warrant invalid and suppressed evidence as to both defendant Atkins and codefendant Wiggins. She also ruled the testimony the prosecution sought to present at trial was inadmissable. She set a new trial date of May 30, 1979. (Transcript of 5-14-79).

On May 18, 1979 the prosecution filed an emergency application for leave to appeal these decisions in the Michigan Court of Appeals, a motion for immediate consideration and a motion for a stay of proceedings. The prosecution raised three substantial issues: 1) the lack of standing by defendant Atkins to challenge the search warrant and gain suppression of evidence taken from codefendant Wiggins, 2) the decision finding the search warrant invalid, and suppressing of the telephone conversation seized under it, and 3) the refusal to admit the testimony of Levi Williams.

D. MICHIGAN COURT OF APPEALS ACTION ON PEOPLE'S APPEAL

On May 25, 1979 the Michigan Court of Appeals issued an order, dated May 24, granting the prosecution's application, staying all proceedings and ordering the time limits regarding appellate procedures be halved. The prosecution was

timely in compliance with the court rules, filing a timely claim of appeal on June 4, 1979 and timely brief on appeal on July 5, 1979. Defendant Atkins filed his brief on appeal on July 25, 1979. Oral argument was expedited and held in October 1979, the first month the Court of Appeals returned for sessions. The Michigan Court of Appeals issued its decision on April 16, 1980, reversing the trial court on the first issue and upholding her decision on the remaining two issues. On July 7, 1980 the Michigan Supreme Court denied the People's emergency application for leave to appeal on a 4-3 vote.

E. SECOND BOND/REMAND DECISION IN TRIAL AND APPELLATE COURTS

On August 18, 1979, the People were served with a trial court motion by defendant Atkins for release on bond alleging, that "the People have not made a good faith attempt to commence these proceedings," that "no court of this state has any jurisdiction over this matter due to the 180 day rule" citing MCL 750.131 et. seq. and that defendant was denied his right to a speedy trial, citing Michigan law.

Defendant had been incarcerated in the Wayne County Jail since approximately January 22, 1979.

Judge Evelyn Cooper granted defendant bond of $50,000, two sureties or 10% on August 30, 1979 in a written order.

The People filed for emergency leave to appeal and a motion for immediate consideration in the Michigan Court of Appeals, contending that the trial court's decision was clearly erroneous because she had no authority to grant bond. MCL 780.131 did not apply to a person incarcerated in Wayne County Jail, a pre-trial detention facility, not a penal institution. Moreover, the previous decision of the Court of Appeals

canceling defendant's bond became law of the case on the matter of bond under GCR 1963, 790, and could not be altered, especially by the lower level trial court. Further, the Court of Appeals had previously granted a stay of proceedings until it rendered its decision as to admissibility of evidence at trial. The People also argued that GCR 1963, 789 controlled the issue of speedy trial; defendant has *not* been incarcerated for six months using the time computations (and exclusions) of GCR 1963, 789.2.

Proceeding on an expedited basis as provided for by court rule and after examining the trial court's written order and briefs by both parties, the Court of Appeals on September 12, 1979, ruled in Docket No. 47064:

> IT IS FURTHER ORDERED that the order of the trial judge setting bond be, and is hereby set aside and the bond cancelled. Defendant is ordered remanded to the custody of the Wayne County Sheriff pursuant to this Court's order of February 9, 1979.

Defendant filed an emergency application for leave to appeal in the Michigan Supreme Court. The Michigan Supreme Court granted immediate consideration but denied leave to appeal on November 2, 1979, Docket No. 63825.

F. PETITION FOR WRIT OF HABEAS CORPUS

On November 19, 1979 defendant Aaron Clinton Atkins filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan.

Procedurally, the facts subsequent to filing the petition on November 19, 1979 show that this petition was referenced by Judge Taylor to Magistrate Paul Komives on November 26,

1979 for a recommendation (Docket Entry Number 2) (hereinafter D.E.).

Respondent William L. Cahalan received a copy of this Order of Reference. Respondent, through Anne B. Wetherholt, Assistant Prosecuting Attorney, called District Court on November 29, 1979 and talked with Ms. Fishman, clerk to Judge Taylor. The assistant prosecutor informed the clerk she wanted an opportunity to respond to the allegations; she was informed that if the petition was not to be dismissed, her office would be served with the pleadings and given an opportunity to respond. This respondent heard nothing more about this petition until served with a copy of the petition on March 6, 1980 and an order requiring a responsive pleading by March 28, 1980. (D.E. 9, 10, 11) Meanwhile, the Attorney General for the State of Michigan, who was *not* a proper party to this suit because petitioner was being held by Wayne County officials, not the State Department of Corrections, had been served on January 10, 1980 with an order requiring a responsive pleading by February 20, 1980. (D.E. 4) Without realizing he was not properly a party in this suit, an assistant attorney general filed an appearance and routine motion for enlargement of time on February 22, 1980 without filing any responsive pleadings (Vol. I of U.S. District Court transcript, April 7, 1980, pages 34-39) (hereinafter I). Petitioner objected to enlargement. (D.E. 8) On February 28, presumably having realized that Wayne County officials were the authorities detaining petitioner, Magistrate Komives ordered the Wayne County Sheriff and Wayne County Prosecutor be served and ordered to respond by March 28, 1980. (I. 36; D.E. 10) As indicated above, service was effected on March 6, 1980. Nevertheless, on March 10, 1980 Judge Taylor issued an order denying the Attorney General's motion for enlargement, noted that the petition was not subject to summary dismissal and ordered the Attorney General to show cause on April 7,

1980 "why the relief requested should not be granted." (D.E. 12; I. 36) Wayne County officials, who were the proper parties to this suit, were *never* served with this order. (D.E. 12). The record will confirm that Wayne County officials have never violated any order to file responsive pleadings. Moreover, Wayne County did file timely responsive pleadings on March 27, 1980 (D.E. 13 and 14) (despite the fact that the prosecution's appellate file of the numerous state proceedings in this matter was at that time comprised of *three volumes* of pleadings — each volume being approximately two inches thick.) Hence, the show cause order of March 19, 1980 was not applicable to Wayne County officials. Further, the only notice they received concerning this March 7, 1980 hearing was a verbal telephone request by a clerk from Judge Taylor's courtroom to Edward Reilly Wilson, Principal Attorney, Appeals, the week prior to the hearing, to send someone to appear on April 7th to discuss who was the proper party respondent. This person informed Mr. Wilson this was *not* a hearing on the merits (I. 32, 40). Accordingly, due to reliance on the district court's oral representation, the prosecutor's office (representing the Wayne County Prosecutor and Wayne County Sheriff) was "unprepared" on April 7th when the judge wanted argument on the merits. After petitioner's counsel argued on the merits on April 7th, the judge adjourned argument until April 14th so the respondent could "prepare" a response. At 4:00 p.m. on April 14th, respondent began its response. Upon completion of argument at about 5:24 p.m. the judge informed the parties that she would issue her opinion at 10:30 a.m. the next day, April 15, 1980. Her seventeen page opinion, granting Aaron Clinton Atkins' pretrial preconviction petition for a writ of habeas corpus, ordering him discharged from Wayne County Jail and dismissing the state criminal murder charge against him, was issued at that time. (Vol II of U.S. District Court transcript, April 14, 1980, page 41).

On April 18, 1980 respondent filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit. On March 2, 1981 the Sixth Circuit Court of Appeals issued an opinion which reversed the judgment of the district court, reinstated the state criminal charge of murder, and ordered that the state trial commence within sixty days.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BY THE SIXTH CIRCUIT COURT OF APPEALS, HOLDING THAT THE REMEDY FOR A CLAIM OF DENIAL OF THE RIGHT TO A SPEEDY TRIAL MADE IN A PETITION FOR A WRIT OF HABEAS CORPUS FILED PRIOR TO TRIAL AND PRIOR TO CONVICTION IN THE STATE CRIMINAL CASE WAS TO ORDER THE STATE TO PROCEED TO TRIAL, NOT TO DISMISS THE STATE CRIMINAL CASE, WAS A CORRECT APPLICATION OF THE DECISIONS OF THIS COURT.

Petitioner's argument that the decision by the Sixth Circuit Court of Appeals is incorrect and his reliance on *Barker* v *Wingo*, 407 US 514 (1972) and *Strunk* v *United States*, 412 US 434 (1973) totally ignores the fact that this Court has created a distinction between review of habeas corpus petitions filed prior to trial/conviction in the state court and claims brought after conviction in state court, and another distinction between remedies available to denial of speedy trial claims made prior to trial/conviction in the state court and claims made after conviction in state court. *Strunk* and *Barker* apply to *post* conviction claims alleging that a defendant was denied his right to a speedy trial. As such, they are *not* applicable to the instant situation.

Where, as in the instant case, a habeas corpus petition is filed *prior* to trial/conviction in the state court, principles of comity and federalism normally preclude federal intervention in state criminal proceedings. Hence, even though a state defendant may have raised the issue of the denial of a federal right in each level of the state's court system, the abstention doctrine requires he proceed to trial before he will be deemed to have exhausted his state remedies so as to permit a petition for a writ of habeas corpus to lie in federal court. This distinction is made abundantly clear from reading the case of *Carden* v *Montana*, 626 F2d 82 (9th Cir. 1980), *cert. den.* __ US __; 101 SCt 573; 66 LEd 2d 473 (1080). In *Carden* the Ninth Circuit Court of Appeals reversed the federal district court's order granting a pretrial/preconviction petition for a writ of habeas corpus and dismissing the state's criminal case. Even though petitioner had raised the speedy trial claim at each level of the state system, the exhaustion requirement had not been fulfilled so as to permit federal intervention because petitioners had not yet been to trial on the state charge. The remedy for their claim of denial of their right to a speedy trial was to proceed to trial, *not* to dismiss the state charges. See also *Moore* v *DeYoung*,, 515 F2d 437 (3rd Cir. 1975).

Closely coupled with this doctrine is the "prematurity" rule regarding claims of denial of the right to a speedy trial. In *United States* v *MacDonald*, 435 US 850 (1978), this Court emphasized its rule *against pretrial appeals* in criminal cases *on speedy trial grounds* because the factors stated in *Barker* v *Wingo, supra*, especially prejudice, could not be accurately measured before trial:

> Even if the degree of prejudice could be accurately measured before trial, a speedy trial claim nonetheless would not be sufficiently independent of the outcome of the trial to warrant pre-trial appellate review. The claim would be largely satisfied by an

> acquittal resulting from the prosecution's failure to carry its burden of proof. The double jeopardy motion in Abney was separable from the issues at trial because "[t]he elements of that claim are completely independent of [the accused's] guilt or innocence." 431 US, at 660, 52 LEd 2d 651, 97 S Ct 2034, since an acquittal would not have eliminated the defendant's grievance at having been put twice in jeopardy. In contrast, a central interest served by the Speedy Trial Clause is the protection of the fact-finding process at trial. The essence of a defendant's Sixth Amendment Claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged. Normally, it is only after trial that the claim may fairly be assessed. 435 US at 859-860.
>
> * * *
>
> Allowing an exception to the rule against pretrial appeals in criminal cases for speedy trial claims would threaten precisely the values manifested in the Speedy Trial Clause. And some assertions of delay-caused prejudice would become self-fulfilling prophecies during the period necessary for appeal.
>
> There is one final argument for disallowing pretrial appeals on speedy trial grounds. As the Court previously has observed, there is nothing about the circumstances that will support a speedy trial claim which inherently limits the availability of the claim. See *Barker* v *Wingo*, 407 US, at 521-522, 530, 33 LEd 2d 101, 92 S Ct 2182.
>
> 435 US at 862.

Although *MacDonald* involved an interlocutory appeal of a federal district court order, respondent believes the same

reasoning applies even more acutely to collateral review by pretrial/preconviction habeas corpus proceedings in which federal intervention to prevent a state trial on state criminal charges is sought. Moreover, the reasons stated in *MacDonald* for not hearing pretrial appeals seeking dismissal of charges on speedy trial grounds apply equally to pretrial habeas corpus petitions: the constitutional claim remains available after trial, the degree of prejudice cannot accurately be measured prior to trial, and the time necessary to challenge habeas corpus petitions in federal court and appeal erroneous dismissals of state cases by the federal courts on speedy trial grounds unnecessarily aids the prisoner's claims of delay by fueling his self-fulfilling prophesy. Such was the holding of *Carden* v *Montana, supra*, this court subsequently denying the petition for a writ of certiorari.

This does not mean, however, that a person claiming a pretrial/preconviction denial of his right to a speedy trial is without a remedy. In *Braden* v *30th Judicial Court of Kentucky*, 410 US 484 (1973) this Court concluded that the habeas corpus petitioner was entitled to raise the speedy trial claim prior to trial because the remedy he sought was to compel a good faith effort by the state court to bring him to trial on the criminal charge, *not* to litigate a speedy trial defense to the criminal charge:

> Petitioner does not, however, seek at this time to litigate a federal defense to a criminal charge, but only to demand enforcement of the Commonwealth's affirmative constitutional obligation to bring him promptly to trial. *Smith* v *Hooey*, 393 US 374, 21 L Ed 2d 607, 89 S Ct 575 (1969).
>
> * * *
>
> Moreover, petitioner made no effort to abort a state proceeding or to disrupt the orderly functioning of state judicial processes. He comes to federal court,

> not in an effort to forestall a state prosecution, but to enforce the Commonwealth's obligation to provide him with a state court forum.
>
> 410 US at 489-491.

Under these particular circumstances federal habeas corpus action prior to trial would not jeopardize any legitimate interest of federalism. The Court later reiterated its position that the pretrial/preconviction habeas corpus petition was available *only* to compel, *not to prevent*, the state trial of state criminal charges:

> We emphasize that nothing we have said would permit the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court. The contention in dissent that our decision converts federal habeas corpus into "a pretrial-motion forum for state prisoners," wholly misapprehends today's holding.
>
> 410 US at 493.

Accordingly, the subsequent holding by the Supreme Court in *MacDonald* expressing the policy against pretrial appeals on speedy trial grounds where the remedy sought is dismissal of the criminal charges, is *wholly consistent* with *Braden*, and, as held in *Carden* v *Montana, supra*, is equally applicable to the instant situation where this petitioner sought federal intervention by way of a habeas corpus petition to litigate, prior to trial, a speedy trial defense to the state charges.

The Sixth Circuit Court of Appeals correctly recognized the law applicable to the instant facts. (See pages 16-21 including footnote 1 on page 16 of Appendix "A" contained in Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.)

> [T]he Speedy Trial Clause *does not,* either on its face or according to the decisions of this Court, *encompass a "right not to be tried"* . . .
>
> 435 US at 861. (emphasis added)

CONCLUSION AND RELIEF

Thus, the Sixth Circuit Court of Appeals order, reversing the decision of the federal district court, reinstating the state criminal charge of murder, and ordering the state trial to commence within sixty days, was a correct application of the law governing pretrial/preconviction habeas corpus relief and claims of denial of the right to a speedy trial.

For the foregoing reasons, the State of Michigan, respondent herein, respectfully requests this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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